No. 3075

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWEST AUTO COMPANY, a Corporation, *Plaintiff in Error,* *vs.* W. H. HARMON, *Defendant in Error.*	No. 3075.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Brief of Defendant in Error

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STATEMENT.

We believe that a very brief statement of the facts, supplemental to those appearing in the statement of plaintiff in error, will very materially aid the court in understanding the real controversy in

this case, and the limits of the inquiry open here. With that end in view we shall call attention to the issues attempted to be made by the answer of the plaintiff in error, and the evidence introduced on the trial of the action.

PLEADINGS.

The defendant in error, in her complaint in this action, alleged in substance:

The corporate capacity of the defendant in error as an Oregon corporation; the fact that at all times mentioned in the complaint it was engaged in the sale of automobiles in the State of Washington; that on or about the 17th day of October, 1914, plaintiff in error entered into a contract with the Harmon Motor Car Company, a copy of which is attached to the complaint, marked Exhibit "A" and made a part thereof by appropriate reference, a copy of which contract appears in the brief of the plaintiff in error on page 27 thereof, this being the contract on which the action was founded; that relying on the contract, the Harmon Motor Car Company established certain distributing points, equipped a sales room, shop and garage, employed salesmen for the purpose of the sale, distribution, etc., of the automobiles, advertised such cars for sale, and in all

respects properly prepared to carry out its part of the contract, with the terms of which it in all respects complied; that on February 22, 1915, after delivering to the Harmon Motor Car Company but nine automobiles, plaintiff in error, without cause and without fault on the part of the Harmon Motor Car Company, breached said contract and notified it in writing that the contract was cancelled, and thereafter refused to deliver any more cars to it, a copy of the notice of cancellation being attached to the complaint, marked Exhibit "B" and by appropriate reference made a part thereof. (A copy of that notice appears on page 11 of the brief of the plaintiff in error.) That if the plaintiff in error had complied with the terms of the contract and had furnished the cars which by the terms of said contract it had agreed to sell and deliver to the Harmon Motor Car Company that company could and would have sold all of said cars at a profit and would have made a profit thereby of $13,727.10 in which amount it was alleged the defendant in error was damaged by the action of the plaintiff in error; that on the 1st day of February, 1915, the Harmon Motor Car Company assigned and transferred to the defendant in error in writing all its right, title and interest in and to all claims of whatsoever nature it had in the plaintiff in error, including said cause of action, and

prayed for judgment in the sum of $13,727.10 with costs and disbursements of the action. (2-4).

In its answer plaintiff in error, after admitting its corporate capacity, the execution and delivery of the contract as alleged, denied every other material allegation of the complaint, except that it delivered to the Harmon Motor Car Company, prior to February 22, 1915, eight of the automobiles it had contracted to sell to it. (16-18). By way of a first affirmative defense plaintiff in error alleged: That at the time it executed the contract in question F. E. Harmon represented that the Harmon Motor Car Company was a corporation, and that he was its president, but that subsequent to that time plaintiff in error ascertained that such company was merely a trade name under which said Harmon did business. (18). This allegation was denied by the defendant in error on information and belief. (22). In its first affirmative defense defendant in error further alleged that by paragraph No. 3 of said written contract of sale the seller (plaintiff in error) reserved the right to reapportion the territory described in the contract at any time during the life of the contract, if, in the opinion of the seller the dealer (Harmon Motor Car Company) was not properly promoting the sale of Reo cars

in all or any part of the territory described in the contract, but should give at least ten days' notice of such reapportionment. (18). This allegation was admitted by the defendant in error in her reply. (22). Plaintiff in error further alleged as a part of its first affirmative defense that after said F. E. Harmon, trading as the Harmon Motor Car Company, had entered upon the performance of said contract, and in the month of January, 1915, plaintiff in error learned that Harmon was indulging in intoxicating liquors to excess, was neglecting the business of selling cars, was arrested, lodged in jail charged with "joy riding" and disorderly conduct, and wired to the president of the plaintiff in error at Portland, Oregon, to come to Seattle; that upon complying with the wire the president of the plaintiff in error found said Harmon in jail, charged with disorderly conduct; that defendant in error was in charge of the Harmon Motor Car Company at that time, and that he informed her that the contract would be terminated "as by its terms provided;" that defendant in error asserted that she could borrow the necessary money and could herself carry out the terms of the contract, but that upon inquiry it was ascertained that the said Harmon and the Harmon Motor Car Company were each wholly without credit and without any means what-

soever of carrying out or completing said contract; "that said F. E. Harmon had wholly failed to purchase cars as provided by paragraph 8 of said contract" and was in default in the payment of the note mentioned in the last clause of the contract of sale; that plaintiff in error cancelled the contract of sale after it had ascertained that neither the defendant in error nor the Harmon Motor Car Company had sufficient funds or credit to fulfill or carry out the contract after the defendant in error, on or about February 20, 1915, had advised it that she was unable to borrow any money or secure the means with which to carry out said contract, and further alleged:

> "In this connection the defendant states to the court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise." (18-20).

Replying to such allegations the defendant in error admitted that Harmon was lodged in jail in the City of Seattle on or about February 1, 1915,

and that he wired the president of the plaintiff in error to come to Seattle, but denied each and every other allegation. (22).

For a second affirmative defense, plaintiff in error plead the clause, attached to the contract of sale, referring to the payment of a note for $2394.03, and alleged that said note had not been paid within the time therein limited, or at all, but was in considerable part long past due and wholly unpaid on the date of the notice of cancellation.

In her reply the defendant in error denied all of the above allegations as to the non-payment of the note. (22).

Plaintiff in error further alleged, as a part of its second affirmative defense, that after the lapse of ten days from the date of the service of its notice of termination the contract of sale was terminated and the territory therein described was reapportioned and assigned to other dealers in the City of Seattle (21); and in her reply the defendant in error admitted that said contract was terminated, but denied the other allegations. (23).

For an affirmative reply to said affirmative defenses the defendant in error alleged: That the note mentioned and described in the second affirma-

tive defense had been fully paid and that the payment thereof was accepted by the plaintiff in error as payment under the contract of sale. (23).

On the trial, after defendant in error had rested, plaintiff in error was permitted, over the objection of defendant in error, a trial amendment in the form of an additional affirmative defense, in which, in substance, it alleged: That it had not furnished to the Harmon Motor Car Company at the time the contract of sale was cancelled the number of cars required by the terms of said contract, but that during that period it had furnished all the cars it could procure from the manufacturers that were not allotted under contract to other agencies; that if the Harmon Motor Car Company had suffered damage by reason of not getting the entire number of cars it was through no default of plaintiff in error, but due to its inability to procure the cars, and that if the contract in question had not been cancelled by it, it would have been unable to furnish to the Harmon Motor Car Company the entire number of cars it had agreed to sell between the date of the cancellation of the contract and of its termination, because of its inability to procure the cars. (238-239). This affirmative matter was denied by defendant in error. (239).

EVIDENCE.

We shall not set forth the evidence fully and in detail at this point, because it would involve repetition of the same when discussing the assignments of error argued by the plaintiff in error, and call attention to this fact at this time in order to prevent any impression on the part of the court that the evidence is all set forth in detail.

The Harmon company was required by the terms of the contract to deposit $750.00 with the plaintiff in error as a guarantee for the satisfactory performance of the agreement. In fact, at the time the contract was cancelled the Harmon Company had $1200.00, or $450.00 more than the contract required, deposited with the company. (95, 234).

The Harmon Company had been in business two years prior to the execution of the contract sued on. (135). Its place of business was located at a prominent corner in the very center of the automobile district in Seattle, and one of the best, if not the best, corner in the city for an automobile agency. (51-52). The location of the building on the corner gave it two sides up and down two streets for half a block. (126). The building occupied by

it had been specially constructed for an automobile sale and display room. (136-137).

During the season of 1914 the Harmon Company had handled for the first time the Reo car and during that season had sold 56 Reos out of a total sale of 133 cars and trucks. (186).

After entering into this contract the Harmon Company had spent from $1500 to $2000 in advertising the Reo car, establishing new agencies and preparing to advantageously promote the sale of Reo cars during the season of 1915, the period covered by the contract. (51, 133).

The contract in question, in paragraph numbered 1, provided as to the payment of the machines "sight draft against bill of lading with exchange, unless otherwise agreed." This is the usual mode adopted everywhere for payment of automobiles by the retailer. (141). This mode of payment had been in force and effect in the previous purchase of automobiles by the Harmon Company, and had been in effect between the Harmon Company and the plaintiff in error during the season of 1914. (69, 70, 71, 141, 142). During the preceding year the Harmon Company had done its banking business at the Northern Bank & Trust Company, and such

drafts, when the company did not have sufficient funds of its own to pay them, were paid by it through The Northern Bank & Trust Company and this same arrangement was in effect between the bank and the Harmon Company for the season of 1915, (69, 70, 71, 72, 133, 141, 142), which arrangement was made for the balance of the season by defendant in error personally after she took exclusive charge. (71, 133, 304). The arrangement so made by the Harmon Company with the bank was entirely satisfactory to the plaintiff in error, because on February 15th, 1915, after the defendant in error had told Mr. Vogler, the president of the plaintiff in error, (76, 122, 198) all the facts, without reserve, (77) concerning the business and F. E. Harmon's retirement from the business, and after she had commenced to manage the same, plaintiff in error wrote to the Harmon Company a letter which shows its entire satisfaction with the arrangement. (Plaintiff's Exhibit 11). Thereafter, on February 19th, 1915, *three days before notice of the cancellation of the contract was given,* and as stated in said letter, plaintiff in error shipped four Reo cars to the Harmon Company with draft attached to bill of lading, through said bank, which draft was promptly paid, (67-70) as all drafts for machines

shipped to the Harmon Company theretofore had been promptly paid. (70, 141, 142).

Prior to the notice of cancellation of the contract the Harmon Company had sold 57 of the 100 cars which the plaintiff in error had agreed by the contract in question to sell to it, (138-14), and was then entering upon the best part of the season,—March, April, May and June,—for the sale of automobiles, these being the months in which the retail sales are principally made. (63, 64, 143). No complaint was ever made that the Harmon Company was not selling a sufficient number of cars. In fact, it sold the cars much faster than the plaintiff in error furnished them. (249). On this point the testimony of the witness Clark, the secretary of the plaintiff in error (230) is conclusive to the effect that the Harmon Company wanted all the cars the plaintiff in error could furnish it, and that no complaint was made that the Harmon Company was not taking all the cars plaintiff in error could give to it. (249). If fact, the Harmon Company, after the contract in question was entered into, repeatedly wrote and telephoned the plaintiff in error at Portland, to send all Reo cars it had, *regardless of their kind and to ship "all they could give us."* (68, 130). Clark himself admitted that the Harmon

Company began asking for cars within thirty days after the contract was entered into, and that Mr. Thornton, on behalf of the Harmon Company, had telephoned him on two occasions, asking for cars, and that he, Clark, knew that the Harmon Company wanted all the cars plaintiff in error could give it. (248, 249). In fact, by the terms of the contract the Harmon Company had agreed to take, and was anxious to get, all of the 35 cars which were to be delivered monthly from October, 1914, to February, 1915, both inclusive. Plaintiff in error had shipped but nine cars (102) prior to the cancellation of the contract on February 22d, 1915. The Harmon Company had sold 57 of the 100 cars (105, 138, 140) and was then entering upon the very best part of the season,—March, April, May and June,—for the sale of automobiles, that is, the period in which retail sales are principally made. (63, 65, 143).

Although the Harmon Company had, prior to the real beginning of the automobile season, sold more than half of the cars which the plaintiff in error had agreed to sell and deliver to it, and although the Harmon Company had been repeatedly telephoning and writing to the plaintiff in error at Portland for cars, and to send it all the cars possible, irrespective of kind, on the 22d day of Feb-

ruary, 1915, the plaintiff in error, to the complete surprise of the defendant in error, (79) cancelled the contract of the Harmon Company, by means of a letter, a copy of which appears on page 11 of plaintiff in error's brief, and notified all the agents of the Harmon Company of that fact. (80). Notice of this cancellation came when the Harmon Company was about to make its big spring drive in the trade.

On February 5th, 1915, F. E. Harmon, theretofore the president of the Harmon Motor Car Company, assigned all his stock therein to the defendant in error, and thereupon severed all connection with the company. (121, 122). The defendant in error had been connected with the automobile business of the McKenna-Harmon Company and the Harmon Company since each commenced business in Seattle, the former in 1912, as secretary and treasurer of each company. She had devoted all her time, both in an administrative and an executive capacity to them and was fully acquainted with every phase of the business (46, 47) and was perfectly capable of conducting the same (303) and had engaged the witness, Thornton, who had theretofore been connected with the selling end of the Harmon Company

and who was familiar with its business as her sales manager. (91).

From the year 1912 to the latter part of February, 1915, the Harmon Company had built up a good business. (50). It took on the Reo and Lozier cars from the plaintiff in error in 1913, and sold 56 Reos during the year 1914 out of a total sale of 133 cars and trucks during that season. (186). It maintained a good service and repair department for the care of cars, as provided in Section 9 of the contract, which is a necessary and one of the biggest factors in the sale of cars (57); also a well equipped machine shop and garage, and employed at times from 18 to 19 men. (60, 61). It had established sub-agencies in Snohomish, Skagit, Whatcom and Clallam Counties for the sale of Reo cars. (64). Copies of the contracts for the sale of these cars had been sent to the plaintiff in error, and it knew these sales had been made. All of the cars having been shipped with sight draft attached to bill of lading to The Northern Bank & Trust Company, as had been previously done (140, 141, 142) defendant in error had previously arranged, upon her taking charge of the company, to have drafts for future business paid through such bank, pursuant to the assignment of February 5th, 1915. (71, 133,

304). *The only difficulty she had in running the business arose from the fact that the plaintiff in error did not furnish her sufficient cars to sell.* (73).

At the time F. E. Harmon assigned and transferred his stock in the Harmon Company to the defendant in error, he did so because she had laid all the facts concerning the relations between herself and her husband before Mr. Vogler, the president of the plaintiff in error (76, 122, 198) when he was in Seattle for approximately a week during the first week in February, 1915, (77), and this was done on the advice and instructions of Mr. Vogler. (122). She then advised Mr. Vogler that she had made the same arrangement with the bank that the Harmon Company had had with it the previous year, which arrangement she had personally made after she and her husband had separated, of which separation she had also advised the bank. (77, 78). *She had prior to the cancellation of the contract no intimation whatever that the same was to be cancelled.* (78, 79). She was unable to get cars after the delivery of February 19th, 1915, and by reason thereof was compelled to return deposits which purchasers had made on cars purchased by them. (80, 81).

At the time this contract was cancelled the automobile business was at its height and it was impossible for the defendant in error to secure another agency that was desirable and which would have been profitable (89) as it is very difficult to sell a car with which the public is not familiar, even though it be a good car, since introducing a new car required pioneering and building up. (90).

Defendant in error had had no relations with her husband after he severed his connection with the company, she having been, since the cancellation of the contract, which put her out of business, working as a stenographer, and had not lived with her husband since February, 1915. (306, 307).

On the trial of the action the plaintiff in error was permitted a trial amendment, as above suggested, in substance, to the effect that it had been unable to furnish the Harmon Company, prior to February 22d, 1915,—the date of the cancellation of the contract,—the cars which it had contracted to sell and deliver to it, because of its inability to secure them from the factory, and that if it had not cancelled the contract it would not have been able during the life of the contract to have furnished to the Harmon Company the cars which it had contracted to sell and deliver to it. This amendment

was made in an attempt to invoke the provision of paragraph numbered 10 of the contract. The proof is conclusive, as shown by the records of the plaintiff in error, which it was compelled to produce upon the trial, that prior to the execution and delivery of the contract in question, plaintiff in error had contracted to sell and deliver only 60 cars, (286-289), and that it had received from the factory 350 cars for sale and distribution by it, prior to the 31st day of July, the date of the expiration of the contract. (286-289). It thus appears that the plaintiff in error was furnished by the factory 320 cars which out of which it was compelled to deliver to the Harmon Company its 100 for the season of 1915; and this is conclusively the proof furnished by the records of the plaintiff in error.

The evidence is overwhelming that had the plaintiff in error not cancelled this contract the Harmon Company and the defendant in error would have sold all of these cars prior to the expiration of the contract and at a very great profit. We shall not attempt to detail the evidence in support of the above statement at this point, because so to do would involve its repetition under the discussion of the assignment of error questioning the amount of the

judgment, but shall detail the evidence in answering that discussion.

The jury to which the case was tried returned a verdict in favor of the defendant in error for $13,727.10, and defendant in error, in order to remove any possibility of question, after calculating the expenses which she would have incurred in making sale of the cars which were unsold at the time the contract was cancelled at the highest amount shown by the testimony (that is, giving the plaintiff in error the benefit of any difference in figures) remitted $983.95 and agreed to accept a judgment of $12,743.15 with costs (36) for which sum judgment was entered in her favor, (39) after the court had denied a motion for a new trial. (38).

ARGUMENT.

Although plaintiff in error has discussed the question of its right to cancel the contract only under the first assignment of error actually discussed by it, the brief seems to be written throughout on the assumption that the right to cancel existed. It will simplify matters greatly and, we believe, relieve the court of considerable investigation, if we may be permitted at this point to call attention to the facts and law showing that there

was neither right to cancel, nor grounds for cancellation of, the contract. And with that end in view we beg to call the court's attention to the following considerations:

The issues in this case are very greatly narrowed when it is borne in mind that the plaintiff in error gave written notice of the cancellation of the contract and in that written notice specified the reasons therefor, and the clause of the contract on which it was proceeding. The notice of cancellation is as follows:

> Northwest Auto Co., Inc.
>
> Portland, Ore., Feb. 22d, 1915.
>
> *Registered.*
>
> Harmon Motor Car Company,
>
> Seattle, Wash.
>
> Gentlemen:
>
> We herewith give you notice that we are obliged to cancel the contract covering the sale of REO cars and parts now existing between us. The factory advise that owing to the condition of affairs at present existing in Seattle, that for the best interests of all concerned, it is desirable that a change be made.
>
> We will call your attention also to the clause attached to the contract regarding the payment of a certain note, which note has not been paid as agreed.

Under the circumstances, therefore, we will consider the contract cancelled ten days from today, as per clause No. 3 in same.

Yours very truly,

NORTHWEST AUTO COMPANY

By W. J. H. CLARK,

WJC E. Secy.

It will be observed from an examination of the contract, which was presented to the Harmon Company for signature, *with the preparation of which the Harmon Company had nothing to do,* (54, 137, 215), that the right to *cancel* the contract was reserved in but *two instances.* The first is contained in the last sentence of paragraph numbered 2, which contains a prohibition of sales of Reo cars outside of the territory described in the contract; and the second is contained in the last sentence of paragraph numbered 8 of the contract which required the Harmon Company to accept delivery of the cars according to the monthly schedule therein mentioned and furnish detailed specifications thirty days prior to the date of delivery mentioned, and in default thereof permitting plaintiff in error to deduct such cars from the total allotment and dispose of them as it might see fit, "or cancel this agreement at their election."

It will further be observed that when the plaintiff in error desired to reserve in the contract the right to *cancel* it, that right was reserved in express terms. It is familiar law that the mention of one is the exclusion of all others. And its application in this instance lies in the fact that having specifically provided the contingencies upon the happening of which it might *cancel* the contract, those instances are exclusive, and the right of cancellation exists in no other instance. Having clearly, therefore, reserved the right to cancel the contract in express terms, when it did reserve that right, it follows that the word "reapportion" cannot be given the meaning which the plaintiff in error now seeks to attribute to it.

The term "apportion" is defined in Webster's International Dictionary thus:

> "Apportion—to divide and assign in just proportion; to divide and distribute proportionately; to portion out; to allot; to apportion undivided rights; to apportion time among various employments."

In the same authority the term "reapportion" is defined thus:

> "Reapportion—to apportion again."

It is perfectly apparent from a moment's inspection of this clause of the contract that it was meant to apply to a situation in which it developed that the territory allotted to an agent under the contract was too large for him to cover, or where an agent was, without excuse, working only part of his territory. In other words it is perfectly apparent that what the plaintiff in error desired was to have all parts of the territory allotted worked as thoroughly as its ability to deliver machines would warrant. An attempt now made to assert that by virtue of its power to reapportion the territory in the event sales of Reo cars were not properly promoted is to make the clause apply to a situation utterly foreign to its real purpose. And above all, the fact must not be overlooked that when the plaintiff in error desired to reserve in the contract the right to *cancel* it, it reserved the right to *"cancel"* in express terms and by the use of that term and no other.

In this connection we urge the court to bear in mind a familiar rule of law, expressed thus by the Supreme Court of the United States:

> "If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should

> be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him. * * * *Noonan vs. Bradley,* 9 Wall., 394.

The same rule was expressed by the Supreme Court of Georgia in the case of *Buick Motor Company vs. Thompson* (Ga.) 75 S. E., 354, 356, as follows:

> "It has been held that, where one of two parties prepares a written or printed contract and obtains the signature of the other party, if it contains ambiguous terms, and such ambiguity is not explained, the construction which goes most strongly against the party so preparing it will be generally preferred."
> To the same effect see:
>
> *Orient Mutual Ins. Co. vs. Wright,* 1 Wall., 456.
>
> *Garrison vs. W. S.,* 7 Wall., 688.
>
> *Moorfield vs. Inc. Co.,* (Ga.) 69 S. E. 119.
>
> *Wier vs. Am. Locomotive Co.* (Mass.) 102 N. E. 481, 483.

The plaintiff in error contended that it had the right to cancel the contract of paragraph three thereof, which is as follows:

> "The Seller reserves the right to reapportion this territory at any time during the life of this contract, if, in the opinion of the Seller, the Dealer is not properly promoting the sale of REO cars in all or any part of the above described territory, but shall give at least ten days' notice of such reapportionment."

It will be observed that nowhere in that paragraph is the right of cancellation given, but the sole right retained is to reapportion the territory at any time during the life of the contract if the dealer is not properly promoting the sale of Reo cars.

It stands without dispute that the Harmon Company had sold 57 of the 100 cars prior to the beginning of the real automobile season. It had established sub-agencies in the counties above mentioned. It had done everything that could possibly be done to "properly promote" and sale of Reo cars and the only reason under the shining sun why nothing more was done was because the plaintiff in error was not complying with its agreement as to delivery of cars to it. It paid for the cars shipped it on the spot; as above set forth there was no delay at any time in such payments; it had established a shop and salesroom, as provided by the contract, these being in the very center of the automobile dis-

trict, on a corner, and built expressly for that purpose; it maintained the very highest kind of service for its patrons; it even did the work required by patrons at night, if they desired it done. It not only repeatedly wrote, but telephoned, the plaintiff in error to send it *any* kind of Reo cars, irrespective of type, size, color, or anything else, and at the time the plaintiff in error cancelled the contract, under the provision of the contract permitting it to reapportion the territory, if the Harmon Company was not properly promoting the sale of Reo cars it was because the Harmon Company had been brought to a standstill wholly and solely by reason of the fact that the plaintiff in error was not furnishing it cars for sale and delivery, knowing a fact, which has never been denied, that it is almost impossible to make retail sales if some reasonable delivery cannot be promised.

We submit that, if on such a record of accomplishment, if having done everything in its power to sell Reo cars, if having sold more than half its allotment prior to the beginning of the real automobile season, if having paid for the cars spot cash upon presentation of draft and bill of lading, and its further sales having been brought to a standstill because of the failure of the plaintiff in error

to make deliveries according to its agreement, the plaintiff in error may cancel the contract for alleged failure to properly promote the sale of Reo cars, then the law, the purpose of which is to compel justice and fair dealing between man and man in the performance of their obligations, has utterly failed in its purpose.

It is familiar law that where a party gives one reason for his conduct touching anything involved in a controversy, he cannot after litigation has arisen thereon change his ground and charge a different reason for his action.

Ohio & M. Ry. Co., 6 Otto, 258.

Goodman vs. Purnell, 187 Fed. 90, 93.

Polson Logging Co. vs. Neumeyer, 229 Fed., 705.

Davis R. B. & M. Co. vs. Dix, 64 Fed. 400, 410.

Oakland S. M. Co. vs. Wolf Co., 118 Fed., 239, 248.

Single vs. Wilson, (W. Va.) 80 S. E., 1108.

Ginn vs. Clark Co. (Mich.) 106 N. W. 867.

Meineke vs. Falk (Wis.) 21 N. W. 785.

Ricketts vs. Buckstaff (Neb.) 90 N. W. 915, 916.

In the case of *Ohio & M. Ry. Co. vs. McCarthy, (supra)* 6 Otto, 258, the Supreme Court of the United States said:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

In its decision in the *Polson* case *(supra)* 229 Fed. 705, this court quoted with approval the rule laid down by the Supreme Court of the United States in the case last cited. It follows, therefore, that when the plaintiff in error sent its written notice of February 22d, 1915, cancelling the Harmon Company's contract, in which it states its reasons for its action and the provision of the contract upon which it was proceeding, it was thereby estopped to urge another or other ground for its action on the trial of this case.

Not having power to cancel the contract by virtue of a power to reapportion the territory, it remains to be seen what other reason was assigned by the plaintiff in error for its cancellation of the contract.

In the letter of cancellation of the contract in question, plaintiff in error called attention to the last clause of the contract regarding the payment of a note, and asserted that the note had not been paid *"as agreed"*. We will assume, as correct, the most favorable construction of that clause that could be adopted, so far as concerns the plaintiff in error, that is, that thereby it was meant to be asserted that the note was not only not paid but that payment was not made in strict accordance with the terms of the note and contract, and that a default was thereby committed which justified the plaintiff in error in cancelling the contract.

In the first place, the testimony is ample that this note was fully paid prior to the notice of cancellation, and that prior to such notice it was understood by both Vogler and the defendant in error that it was paid in full. (73, 74, 75, 79, 93, 94, 96, 98, 101, 102). *Vogler did not deny that fact.*

The testimony is further without dispute that this note was paid by the Harmon Company in installments and was so accepted by the plaintiff in error as payment according to the contract. (Plaintiff's Exhibit 7, 76). The testimony also is to the effect that such payments were satisfactory. (76).

These letters clearly show that plaintiff in error in acknowledging receipt of partial payments upon the note was not insisting upon payment of the note according to the strict terms of the contract and note, and that these partial payments were satisfactory to it. Two principles of law foreclose this question against the plaintiff in error. First, forfeitures are not favored in law, and courts always incline against them.

Phila. Ry. Co. vs. Howard, 13 How. 307.

Ins. Co. vs. Eggleston, 96 U. S. 572.

Knickerbocker Ins. Co. vs. Norton, 96 U. S. 234.

Wheeler vs. National Bank, 96 U. S. 268.

Henderson vs. Carbondale Coal Co., 140 U. S. 25.

Iowa Ins. Co. vs. Lewis, 187 U. S. 325.

Batley vs. Dewalt, 56 Wash., 431.

In the second place, it stands without question that these partial payments were accepted as payments on the note and according to the contract, that they were satisfactory to the plaintiff in error, and that at no time prior to the cancellation of the contract had any intimation whatever been given the defendant in error or the Harmon Company that a violation of the contract in that regard would

be claimed, or that a forfeiture of the contract was even within the realm of possibilities. Of course it stands without question that when these partial payments were accepted without objection and were satisfactory to the plaintiff in error, the Harmon Motor Car Company not only believed that the same were satisfactory but was justified in believing that no attempt would be made to forfeit the contract.

It is familiar law that provisions such as this can be waived, and whatever their form are waived, if payment not strictly according to the terms of the contract is accepted, and that after partial payments have been made and accepted default cannot thereafter be claimed until reasonable notice of an intention so to do has been given.

Phoenix Mutual Life Ins. Co. vs. Doster, 106 U. S., 30.

Hartford Life & Annuity Ins. Co. vs. Unsell, 144 U. S., 439.

Jones vs. United States, 96 U. S., 24.

Knickerbocker Ins. Co. vs. Norton, 96 U. S., 234.

Ohio & Miss. Ry. Co. vs. McCarthy, 96 U. S., 258.

Iowa Life Ins. Co. vs. Lewis, 187 U. S., 335.

Thompson vs. Life Ins. Co., 104 U. S., 252.

N. Y. Indians vs. United States, 170 U. S., 1.

New Orleans vs. Texas &c. Ry. Co., 171 U. S., 312.

Palatine Ins. Co. vs. Ewing, 92 Fed., 111, 114.

Grigsby vs. Russell, 222 U. S., 149.

Brown vs. Guaranty &c. Co., 128 U. S., 403.

Pence vs. Langdon, 99 U. S., 578.

1 *Veach on Contracts,* §592.

Scudder vs. Union National Bank, 91 U. S., 406.

Douglas vs. Hanburg, 56 Wash., 63, 65.

Walker vs. McMurchie, 61 Wash., 489, 491.

Shorett vs. Knudsen, 74 Wash., 448, 450.

Wright vs. C. S. Graves Land Co., (Wis.) 75 N. W., 1000.

Tilden vs. Buffalo Office Bldg. Co., 50 N. Y. Supp. 511, 51.

In the case of *Phoenix Mutual Life Insurance Company vs. Doster (supra)* 106 U. S., 30, the Supreme Court of the United States approved the following instruction to the jury on a similar question:

> "It said, in substance, that if the conduct of the company in dealing with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter the Company ought

not, in common justice, be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and subsequently approved by the company, either expressly or by receiving and retaining the premiums, with full knowledge of the circumstances, the same consequences should follow."

This rule has never been departed from by that court.

This court will observe that the twelfth clause of the contract in question is to the effect that the place of the performance of the agreement is Seattle, Washington. It is familiar law that, in the absence of an express stipulation to the contrary, the law of the place of the performance of a contract governs its construction and the rights of the parties thereunder. The Supreme Court of the State of Washington in the case of *Douglas vs Hamburg (supra)* 56 Wash., 63, 65, said:

"The rule is firmly established in this state, that where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for non-payment of the purchase price or any installment thereof. *Drown vs. Ingels,* 3 Wash., 424, 28 Pac. 759; *Wilson vs. Morrell,* 5 Wash., 654, 32 Pac. 733; *Pease vs. Baxter,* 12 Wash., 567, 41 Pac. 899; *Jennings vs. Dexter Horton & Co.,* 43 Wash., 301, 86 Pac. 576. But the rule is

equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser. *Whiting vs. Doughton,* 31 Wash., 327, 71 Pac. 1026; *Morgan vs. Northwestern Life Ins. Co.,* 42 Wash., 10, 84 Pac. 412; *Insurance Co. vs. Wolff,* 95 U. S. 326; *Insurance Co. vs. Eggleston,* 96 U. S. 572; *Orr vs. Zimmerman,* 63 Mo. 72; *Harris vs. Troup,* 8 Paige, 422; *Estell vs. Cole,* 62 Tex. 695; *Stewart vs. Gates,* 30 Miss. 100; *Watson vs. White,* 152 Ill. 364, 38 N. E. 902; *Monson vs. Bragdon,* 159 Ill. 61, 42 N. E., 383."

In the case of *Walker vs. McMurchie (supra)* 61 Wash. 489, 491, the same court said:

"And where a party to a contract waives a default in its terms as to payment, he cannot again establish his right to proceed strictly thereunder until he has given due notice of his intention to the other party. 29 *Am. & Eng. Enc. of Law* (2d ed.) 685; *Cole vs. Hines,* 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; *Watson vs. White,* 152 Ill. 364, 38 N. E. 902. Such is the announced rule in this court, *Douglas vs. Hanbury,* 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096."

In the case of *Shorett vs. Knudsen (supra)* 74 Wash., 448, 450, the same court said:

"He attempted to show that, some two years after the last payment was due, he demanded payment from the decedent and at the same time declared it forfeited. This he could

> not do, notwithstanding time was of the essence of the contract. The vendor by extending the time of the payment and by indulgence to the vendee in this regard had waived this feature of the contract; and having done so he should not thereafter declare a forfeiture until after the demand for payment, and the lapse of a reasonable time. *Thomas vs. McCue,* 19 Wash., 287, 53 Pac. 161; *Whiting vs. Doughton,* 31 Wash. 327, 71 Pac. 1026; *Douglas vs. Hanbury,* 56 Wash. 63, 104 Pac. 1110; *Walker vs. McMurchie,* 61 Wash. 489, 112 Pac. 500."

It must be accepted, therefore, as a matter of fact and law, that the plaintiff in error could not cancel the contract after it had accepted partial payments in full of the note.

The third reason given by the plaintiff in error for the cancellation of the contract was: "Owing to the condition of affairs at present existing in Seattle," and "for the best interests of all concerned."

For the purpose of the argument we shall assume that everything except that relating to the financial condition of the Harmon Company, testified to on behalf of the plaintiff in error, was actual fact. There was no contention in the lower court, and there is none here, that full and complete knowledge of affairs as they existed was not fully placed before Vogler in Seattle in the first week of

February, 1915, or that full knowledge of the affairs was not obtained by him. In other words, there is no contention that subsequent to the notice of cancellation anything came to the attention of the plaintiff in error which would justify the cancellation of the contract.

In its answer, however, the plaintiff in error made this very full admission:

> "In this connection the defendant states to the court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise."

The effect of this admission, *which has never been denied,* is that the plaintiff in error was perfectly willing to waive any and everything except the alleged inability of the defendant in error to secure the necessary finances to prosecute the work of the agency. That being the fact, it did not lie in the mouth of the witnesses on behalf of the plaintiff in error to complain of anything whatsoever re-

lating to the Harmon Company, except that which might relate to the financial condition of the Harmon Company. Good faith and fair dealing forever closed inquiry in those matters.

Of the financial condition of the Harmon Company no complaint whatever can be made. It is not disputed that all of the cars which were shipped *at any time* were paid for in spot cash. There is not a word of testimony to the contrary. The note mentioned in the clause added to the agency contract had been paid in full, and the testimony of Mrs. Harmon was that Vogler admitted that fact to her, *and Vogler, sitting in the court room, did not deny it.* The "parts account", that is the account for "Reo parts", was paid in full, except for the month of February, 1915, and the contract itself provides in paragraph numbered 5, that bills for parts are due and payable "on or before the 10th of the month following shipment."

There is not a particle of testimony concerning any obligation of any kind on the part of the Harmon Company, to any person, firm or corporation, other than the plaintiff in error, except a judgment in favor of the witness Thornton, which was rendered subsequent to the time the plaintiff in error put the Harmon Company out of business by rea-

son of the cancellation of the contract in question, (134) and its inability to secure another agency. In other words, the testimony is ample that the Harmon Company was able to pay spot cash for all the cars it could get. Arrangements to that effect had been made with the bank and had been acted under for more than a year theretofore and such arrangement had been continued in effect between the bank and the defendant in error after she took exclusive charge of the business. That such an arrangement was in force and effect is conclusively proven by the fact that less than one week prior to the date of cancellation of the contract the plaintiff in error wrote the Harmon Company that it was shipping it four Reo cars, and was drawing on it through The Northern Bank & Trust Company and the fact that when the cars came the drafts attached to the bill of lading were paid spot cash, and the further fact *that there is nowhere a denial thereof.*

On page 12 of its brief plaintiff in error seeks to make a point of a telegram sent it by the defendant in error on Febraury 24th, 1915—two days after the contract was cancelled—in which she speaks of the fact that a man of considerable means would go into partnership with her and put new money into the firm, seeking thereby to establish a right on the part of the plaintiff in error to cancel

the contract. In the first place, there was no lack of financial means on the part of the Harmon Company or the defendant in error; in the second place, if there had been, that fact would have given the plaintiff in error no right to *cancel the contract,* but would have given it the right to reapportion the territory, only in the event that lack of means was preventing the Harmon Company from "properly promoting the sale of Reo cars in all or any part of the above described territory," as set forth in paragraph numbered 3 of the contract. Counsel for plaintiff in error asked her why she sent that telegram. The reason is very apparent. The Harmon Company had taken up the Reo—a very poorly represented agency—the preceding year (190....). Counsel further brought out the fact that she had put $20,000 in the automobile business which had been lost during the two preceding years by reason of the failure of the two companies manufacturing the Interstate and Lozier cars (307); that after having built up the agency and made the wonderful showing of sales that the company had made at the date of the cancellation of the contract, she saw that, on top of that loss, the opportunity she had to get her money back being taken away, too, by the cancellation of the contract (307).

She further said:

> "Well, when I got that letter cancelling my contract, I went through my brain to think of every reason on earth why Mr. Vogler would cancel my contract, whether they seemed reasonable to me or not; and I wrote him a telegram, too, immediately, to keep him from signing up anybody else until I could see him again." (305, 306.)

We respectfully submit that defendant in error offered an explanation of that telegram, contrary to the inference which plaintiff in error sought to have the jury infer from it, which human experience, under the circumstances as they existed, will conclusively prove a fact.

We respectfully submit that on the facts there was at no time any ground for the cancellation of the contract, however strictly the contract might be construed with reference to the facts as they existed, or with reference to any contention by the plaintiff in error.

Plaintiff in error has assigned twenty-three errors, but has seen fit to discuss only six of them. This failure does not indicate supreme confidence in them. The principal assignment of error is to the effect that the contract in suit is one which is not assignable, and forces the position that the contract

was for the personal services of F. E. Harmon, the president of the Harmon Company.

In the first place we deem the assignment completely answered by the fact that there was no assignment by the Harmon Company of the contract in suit; it was of the stock of the company (121) and of the cause of action. In the next place, the plaintiff in error occupies an anomalous position. On page 7 of its brief it is asserted that plaintiff in error, at the time the contract in question was executed, believed that the Harmon Company was a corporation, and that F. E. Harmon so represented it, and then appears this:

> "As above stated, the plaintiff in error assumed in dealing with the Harmon Motor Car Company that it was a corporation and that F. E. Harmon was the president and general manager of the same, and it was in full reliance upon F. E. Harmon individually having full control of the management and operation of said business that said contract was entered into." (pp. 7-8.)

And on page 24 of the argument of the same assignment, plaintiff in error says:

> "The contract involved the personality of F. E. Harmon himself, and such contracts are not assignable."

These respective positions are utterly antagonistic. In the first place the court will observe that the contract was signed on behalf of the Harmon Company by F. E. Harmon as its president; in other words, that the contract was signed strictly as a corporation executes agreements. Nowhere in the contract is it provided that the management or services of F. E. Harmon shall be a condition of the contract; that the personality of F. E. Harmon is a part of the contract; or that a corporation, as the plaintiff in error asserts the Harmon Company was, could not, during the term of the contract, change any or all of its officers. It would be idle to contend that corporations having the power to change officers could not exercise it, after executing contracts containing no provision to the contrary. In the second place, it is nowhere contended in the pleadings or proof that the contract as executed was not the actual agreement between the parties, nor that a mistake was made in drawing the contract, or a false representation, knowingly made, to its damage. It stands, therefore, as the agreement between the parties, and is the measure of their rights and obligations. The personal services of F. E. Harmon not having been reserved by the contract, the Northwest Auto Company was not entitled to the same. Hence, when he severed his

connection with the Harmon Company, the legality of the contract between the plaintiff in error and the Harmon Company was not in the least affected, and no breach of the contract could possibly be claimed.

In order to sustain the assertion that it was entitled to the personal services of F. E. Harmon, plaintiff in error takes the position that the Harmon Company was a partnership. It has asserted in its pleadings, in its testimony and in its brief, that it dealt with the Harmon Company as a corporation, and always believed it to be such. It is difficult, therefore, to understand how plaintiff in error was concerned in the legal status of the Harmon Company when it did not in the contract reserve Harmon's personal services and the management of the company by him.

There is, however, another reason why this assignment of error is utterly unavailing. The McKenna-Harmon Company, as a corporation, began business in October, 1912. McKenna shortly thereafter sold his stock in the corporation to F. E. Harmon and the defendant in error. Thereafter, the necessary steps were taken to change the name of that corporation to that of the Harmon Motor Car Company. Papers therefor were executed and

left in the possession of an attorney to be filed, but the attorney neglected so to do, of which fact none of the contracting parties had knowledge until February, 1915, it being always theretofore supposed that the papers changing the corporate name had been filed as directed (136). The business was carried on after the change of name precisely as it was before (48, 49, 135, 136). On February 5th, 1915, F. E. Harmon sold all his stock in the McKenna-Harmon Company and the Harmon Company to the defendant in error (Plaintiff's Exhibit .....). The only affect which the assignments taken by the defendant in error had on either the McKenna-Harmon Company or the Harmon Company was to divest F. E. Harmon of the corporate stock of the companies and interest in the cause of action set up in this case. The parties having contracted and dealt with each other as corporations, and Vogler even so testified (209), each is estopped to deny the corporate existence of the other. Whether this question is to be resolved by the decision of the Supreme Court of the United States or the Supreme Court of the State of Washington is immaterial, because the same rule is applied by each court. In the case of *American Radiator Co. vs. Kinnear,* 56 Wash. 210, the Supreme Court of Washington adopted as the law of this state the

rule declared by the Supreme Court of the United States in *Whitney vs. Wyman,* 101 U. S. 392, in which last-named case it is said:

> "It seems to us entirely clear that both parties understood and said that the contract was to be and in fact was with the corporations and not with the defendants individually. The agreement thus made could not afterwards be changed without the consent of the other. * * * The corporations having assumed by entering into the contract to have the requisite power, both parties are estopped to deny it."

In the case from which the above quotation is taken, it was claimed that a certain corporation contract was void, because entered into before the articles of association were filed, in violation of a statute, which is the precise question here. The same doctrine was applied in the case of *Ivy Press vs. McKechnie,* 86 Wash. 643.

This rule is supported by unanimous authority, and arose out of the principle of common honesty to the effect that when parties in good faith have dealt with each other as corporations each is thereafter forever estopped to deny the corporate capacity of the other.

In the case of *Ohio & M. Ry. Co. vs. McCarthy (supra),* 6 Otto, 258, the Supreme Court used an

expression which aptly fits the contention of the plaintiff in error in this regard. It said:

> "This point was an afterthought, suggested by the pressure and emergencies of the case."

There is no dispute that the necessary instruments were executed to change the name of the McKenna-Harmon Company to the Harmon Motor Car Company. There is no contention that the filing thereof was not directed, or that the parties all believed they had been actually filed, until they discovered the contrary in February, 1915. The testimony on these points being conclusive, and there being no contention to the contrary, the above mentioned general rule forecloses this contention against the plaintiff in error.

Profits on Sales Made and Which Would Have Been Made.

This question is discussed on pages 30-36 of the brief of the plaintiff in error. It stands without question that the Harmon Company had sold 57 out of the 100 cars. It stands without question that the real automobile season is the months of March, April, May and June (63, 64, 143), and that five times as many cars are sold during this period as during the preceding period of this contract (143).

The Harmon Company had been in business over two years prior to the execution and delivery of the contract in question (42). It had a salesroom and shop specially constructed for the purpose (137), in the very heart of the automobile district in Seattle (126, 137), and the building was located on a corner, giving it a commanding view of a half block each way on two streets (126). It maintained an excellent service department (56, 60, 61), in compliance with paragraph 9 of the contract, and even went so far as to do any work that came in at night if customers desired it (61, 62). The service maintained by an automobile agency is one of the most important features in the success or failure, of any agency (57). This was the condition of affairs prevailing with the Harmon Company at the time it took and entered upon the performance of the contract in question. Naturally the article which the Harmon Company had to sell is a very important matter. As to the desirability of the Reo car from every possible point of view, all of the parties are absolutely agreed. No one spoke more highly of it than did the plaintiff in error. In speaking of the 1915 Model (that being the model for the sale of which the contract in question was entered into), plaintiff in error wrote a number of letters, which

appear in the record as plaintiff's Exhibit 10, from which we make the following extracts:

In its letter of August 7th, 1914, attention is called to the fact that the price of the 1915 Model was lowered; but despite that fact, the car was being "constantly bettered." Speaking of an increased output of cars at the factory, it is said:

> "That lowers the factory cost, as you know, and this saving is given to the agents and dealers, whom they realize helped to create *the wonderful demand made on Reo cars at this time.*"

Speaking of the demand for this car, the following is said:

> "This coming season is going to be another Reo triumph, *particularly from an agency standpoint.*" (Italics ours.)

In the letter of November 28th, attention is called to the fact that the automobile-buying public had been clamoring for weeks and weeks for the announcement of the Rea car; and concerning the car the following was said:

> "From our twelve years' experience in the handling of cars, we have never had the enthusiasm injected into us that these new models have done, and we are willing to stake our life on the fact that your verdict will be the same as ours, viz.: *the greatest value offered in any model of*

of any made in the world today.'' (Italics ours.)

In its letter of December 8th, 1914, the plaintiff in error said:

> "You are bound to catch a wave of approval when this nation-wide announcement is made. It is without question the most sensational ever brought before the automobile-buying public.
>
> "Although our twelve years' experience in the automobile business has made us more or less 'case hardened,' we must say we never had the enthusiasm injected into us that this new model has done."

In its letter of December 15th, 1914, the plaintiff in error said:

> "We believe that every prospect who reads this announcement will 'get it in his blood.' The specifications note many improvements. We are giving the public this year a real 18-caret article full jeweled—the kind that comes in a box. *We are giving greater value than ever before. We feel that no make in the country can produce their equal and offer them at the same price. A bold statement, but we can back it up.''* (Italics ours.)

In the letter of January 13th, 1915, after having actually operated the 1915 Model, the plaintiff in error said:

"We unloaded our first carload of REOS yesterday, and, believe me, Harmon, *they are some cars.* I had the pleasure of driving one of them up Portland Heights this morning, and *I can truthfully say that it shows about 25% more power that the 1914.* This, I know you will be glad to hear.

"*She is also a much easier-riding car than anything we have ever had before in this line,* owing to the longer wheel base and improved upholstering. The new Crown fenders and the one-man top certainly do set the car off, *and makes her look like $2,000.00.*" (Italics ours.)

In the letter of January 23d, 1915, plaintiff in error said:

"You know we have two models in our line this year, both the Four and the Six. From what I have seen of them it is hard to distinguish which is the better car. *The Four is so much improved over last year that you would not know it, both in power and appearance—and better yet, in price.*" (Italics ours.)

In the letter of February 2d, 1915, the plaintiff in error sent to its agents a copy of a letter from Fosdick, an automobile company at Spokane, Washington, which is stated to be self-explanatory. The letter continues:

"This is the reason, gentlemen, that during the Show week which has just passed, we signed up more agents *and made more actual sales than any other three dealers combined. Now*

this is a pretty broad statement, but we can prove it.

"We have got the car this year, and it is up to you to get the orders. You will be enthused just as much as the Fosdick Auto Company after you have seen and tried out our new model." (Italics ours.)

In the Fosdick letters the following appears:

"Dear Mr. Volger:

"The carload of Reos were unloaded Thursday, and they are sure some car this year, *all kinds of power on the hill,* and as you know we are in the midst of winter here now and the roads and streets are deep in snow, *making it the hardest kind of pulling, yet it does not seem to make any great amount of difference to the REO;* the lines of the car cannot be improved upon at all; the general equipment and appearance of the entire car is all or more than we could ask or expect; the price is right, and standing-up qualities need no comment, as they are long ago too well known. * * * (Italics ours.)

In addition to the foregoing, counsel for plaintiff in error, on the trial of the case, in speaking of the 1915 Reo Model, said:

"We don't dispute that that was a good, high-class car for that money. I don't know that that question is at issue here in this case, at all. I don't so understand it is. We certainly don't deny it was a good car for the money." (82.)

The 1914 Reo was a very high-class car (89); the 1915 Model a great improvement over the 1914 Model (88), and sold for $200.00 less money (85, 127). The 1915 Model had a self-starter, had a longer wheel base, was an easier-riding car, was electrically equipped, had better lines, and was a more desirable car throughout than the 1914 Model (85-87, 125-132, 143-147); required small upkeep, gave elegant satisfaction and had a good reputation (143). The price is a material factor in the sale of cars (86, 127). The 1915 Model was a medium-priced car (86, 143). Its nearest competitors were the Buick, the Studebaker and the Overland (86, 126, 127), and the Reo, although a better car, cost $200.00 less (86, 127). The principal competitor of the Reo was the Buick (86), and there was no competition with the Studebaker and the Overland. There was not a prettier car on the market than the 1915 Reo (129). There was a big demand for it and it was practically free from all trouble (129). It had plenty of power and stood up well (87, 143), and gave good satisfaction (88, 143), and *was one of the best medium-priced cars on the market* (85).

The 1915 models of medium-priced cars had, as above suggested, self-starters which made it possible for women to drive them, and the demand and mar-

ket for them was thereby very greatly increased (86, 87, 126, 145). That was the year when automobiles began to be generally used by business men in their business and this created an increased demand (145, 146). The fact that cars had theretofore sold for considerably more money than did the 1915 Reo very greatly increased the demand and market for the Reo, due to the fact that they were brought within the reach of a vast number of people who theretofore could not afford an automobile (87, 145). The jitney came into use in Seattle during that season, and this created an unusual demand for the 1915 car (150). The year 1915 was the greatest year known to the automobile business up to that time; *and sales of medium-priced cars during that year doubled* (126, 145), *and have practically doubled every year since that time* (126, 145). Every other dealer in automobiles during that year doubled his yearly sales theretofore, and there existed no reason why the Harmon Company could not have doubled its 1914 sales (129, 132).

There was not in the lower court a single denial of any of the above facts. They stand admitted.

The Harmon Company first took the Reo agency for the season of 1914. The Reo had been very

poorly represented in Seattle theretofore, nothing much had been done with it and the territory had not been looked after, and there had been very few cars placed in the territory or any work done to build up the agency (190). *This is not denied.* Despite that fact, the Harmon Company took the agency for the Reo car in 1914, under the above circumstances, and during that first year, although it had to spend a good deal of money to build up the agency (190); it sold fifty-six 1914 Reos (55, 186), and including other makes sold 133 in all (55, 186). The witness Thornton, sales manager for the Harmon Company (91), testified that customers for the car had been coming to the salesroom, unsolicited, inquiring for the car (129); that they could have sold twenty to twenty-five of the remaining forty-three cars at retail, right out of the shop, unsolicited (129); that they could easily have sold 125 cars, prior to the expiration of the contract in question (129). *These are facts, and stand undisputed; and the plaintiff in error did not offer or introduce a single bit of testimony in dispute of these facts.*

It must be borne in mind, in addition to all the above and foregoing, that the Harmon Company had the whole of King County, except the little town of Kent—that is, the most populous county, con-

taining the largest city, in the state, in which to sell at retail these forty-three Reo cars (64) during the very best portion of the automobile season—the period during which five times as many cars are sold as in the balance of the year (190).

It would be idle to contend that there is not, in these undisputed facts, substantial ground to justify the jury in finding that the cars could have been sold at retail prior to the expiration of the contract.

The next point argued, at page 31, is that prospective profits cannot be allowed unless they are within the contemplation of the parties at the time the contract was entered into, etc. This is not a correct statement of the rule of law, the rule being, as we understand it, that if the business of which the complaining party was deprived was contemplated, *or could reasonably be presumed* to have been contemplated, by the parties at the time of making the contract, and it is *reasonably* certain that a gain or benefit would have been derived, then such profits may be recovered. In the case at bar the contract shows on its face that the parties had in contemplation the making of profits; and if it does not it cannot be reasonably presumed that they had anything else in contemplation. Certainly

it was not contemplated that the Harmon Company was operating as a charitable institution.

The case of *McGinniss, Administrator, vs. Studebaker Corporation,* 140 Pac. (Ore.), 825, cited at page 25 of the opposing brief, recognizes our contention to be the correct one, and while a recovery was denied in that case to a salesman for prospective commissions, the court, at page 826, says:

> "It should be remembered that the instant case is not analogous to that class of cases where there was an *exclusive agency for a definite period,* or where the agency covered a certain percentage of the entire output, because in such cases subsequent events generally afford an opportunity of showing whether sales would have been made." (Italics ours).

This is the case of defendant in error, for here an exclusive agency for a definite time was created, and subsequent events and actual market conditions for the Reo cars at Seattle and in the territory defined conclusively show that all and more than 100 of the Reo cars could have been sold in the territory defined by the contract and within the time therein provided had the cars been furnished.

The correct measure of damages is laid down by the Supreme Court of the United States in

Benjamin vs. Hillard, 64 U. S. 149, where it is said:

> "* * * The principle thus laid down coincides with that in *Alder vs. Keighly,* 15 M. & W., 117. 'No doubt,' says the court in that case, 'all questions of damages are, strictly speaking, for the jury; and however clear and plain may be the rule of law in which the damages are to be found, the act of finding them is for them; but there are certain established rules according to which they ought to find; and here is the clear rule: *That the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken.*"

According to the undisputed testimony, the Harmon Company had actually sold 57 of the 100 cars which the plaintiff in error had contracted to sell and deliver to it, while plaintiff in error in fact delivered but nine of the 100 cars. It is difficult, therefore, to understand why the profits which would have been made on these 57 cars actually sold could not be recovered, as well as the profits on the remaining 43 cars.

In the case of *Anvil Mining Co. vs. Humble,* 153 U. S., 540, the plaintiff sued the mining company to recover damages for profits which would have been made had the contract not been wrongfully terminated. The quantity of mineral not

mined at the time of the termination of the contract and the cost to mine same was estimated by witnesses and submitted to a jury, and the Supreme Court, while admitting that there was no mathematical certainty either as to the amount of ore remaining in the mine or the cost to mine such ore, and that the testimony only furnished a basis for computing the profits lost, stated the following as a correct rule:

> "Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which *are reasonably certain may be.* And, as said by Mr. Justice Lamar in *Howard vs. Stilwell and B. M. Co.*, 139 U. S., 199: 'But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to objection of uncertainty or of remoteness, *or where from the express or implied terms of the contract itself or the special circumstances under which it was made* it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.'" (Italics ours).

In *United States vs. Behan,* 110 U. S., 338, Behan filed suit in the Court of Claims for expenditures made and loss of profits on a Government

contract broken by the Government by ordering the discontinuance of the work. Behan failed to introduce any testimony as to whether he would have made any profits over and above his expenditures if he had completed the contract, and while the Supreme Court held it could not allow him for any loss of profits when such were not shown, it laid down the following rule:

> "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely—First, what he has already expended towards performance (less the value of materials on hand); Second, the profits he would realize by performing the whole contract. The second item, profit, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton vs. Mayor of Brooklyn,* 7 Hill, 69, they are *'the direct and immediate fruits of the contract, they are free from this objection; they are then part and parcel of the contract itself entering into and in constituting a portion of its very element; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation."* (Italics ours).

In the case of *Farmers Loan & Trust Company vs. Eaton,* 114 Fed., 14, 17, Eaton petitioned the court for relief for the termination of a lease of a line of railroad in the hands of a receiver which he had leased by consent of the court, upon the court's termination of such lease before the time when the same would expire, and sought recovery of profits. In discussing this question the court said:

> "Counsel for appellant conceded that the basis adopted by the lower court for estimating the lessee's damages was as fair as could be adopted, but they contend broadly that the lessee was not entitled to any allowance for what he might have made by the operation of the road if he had been allowed to operate it during the residue of his term. They characterize such damages as speculative and not recoverable. We do not concur in that view. For the breach of such a contract as the one in question we do not perceive what damages could have been more direct and certain than the loss of the profits of operation. The lessee doubtless entered into the lease for the purpose of realizing something from the operation of the road over and above the expenses of running it and the rental. This expected profit was within the contemplation of the parties, and the ouster of the lessee necessarily deprived him of the expected gain. The most that can be said is that the amount of the profit which the lessee would have realized could not have been computed with mathematical accuracy. *The loss of this profit, however, was the natural and probable result of the ouster,*

> *and the fact that the amount of the profit was not susceptible of mathematical demonstration, since the lessee had not been allowed to operate the road, did not render it so uncertain that it should have been excluded* within the rule announced by this court in *Trust Company vs. Clarke,* 92 Fed., 293. (See also *Guerini Stone Co. vs. Colan Const. Co.,* 240 U. S., 264, 280.) (Italics ours).

In *Pennsylvania S. Co. vs. New York City Railway Company,* 198 Fed., 721, 745, the lessee of a certain part of a street railway in the hands of a receiver petitioned the court for damages for termination of its lease before the time of the expiration named therein, and the court, in allowing it damages for loss of profits, said:

> "Manifestly the claimant was entitled to recover the value of its contract. Manifestly also the value of its contract was what it would have made by its performance. Gains prevented when fairly shown are recoverable as damages for breach of contract."

These principles are clearly stated and the necessity for latitude in the reception of proof for damages is pointed out in the opinion of the New York Court of Appeals in *Workerman vs. Wheeler & Wilson Mfg. Co.,* 4 N. E. (N. Y.) 264, 266.

In the case of *Workerman vs. Wheeler & Wilson Mfg. Co.,* 4 N. E. (N. Y.) 264, 266, the Court of Appeals in New York says:

> "It is not true that the loss of profits cannot be allowed as damages for breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with a view to future profits, and such profits are in the contemplation of the parties insofar as they can be properly proved, and they may form the measure of damages. *As they are prospective they must to a certain extent be uncertain and problematical,* and yet on that account a person complaining of a breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding its breach and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to rules of damages, to determine the compensation to be awarded for the breach." (Italics ours).

In *Federal I. & B. B. Co. vs. Hopp,* 42 Wash., 668, 670, Hopp entered into a contract with the Federal Company, a manufacturer of brass beds, whereby he was given certain territory for a stated period in which to sell beds. He spent considerable money in establishing a market for the beds, but the company refused to furnish him beds when ordered by him during the life of the contract, and

in a suit by the company against Hopp for an unpaid balance of account for beds furnished him he counterclaimed for loss of profits owing to the wrongful termination of the contract, and in passing on the question as to his right of recovery, the court said:

> "It is doubtless true that prospective profits are oftentimes speculative, indefinite and imaginary, but there is a reasonable certainty as to some future profit. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all merely speculative and conjectural, or of a character incapable of enforcement. These may be of a substantial character in contemplation of law and such as the injured party would be entitled to recover from the party who had, without justification, broken the contract. Their recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred."

In *Church vs. Wilkeson-Tripp Company,* 58 Wash., 262, 271, Church sued the Wilkeson Company for the breach of a broker's contract to sell certain bonds of the company, and claimed that if the company had not failed and refused to deliver the bonds he could have sold the same, whereupon the court said:

> "*When the direct purpose of the contract* is to enable one of the parties to *earn commissions or profits* he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to recovery of damages for loss of contemplated profits it must, as a general rule, *appear that such loss was reasonably certain and not a fictitious or imaginary one,* and that fact being established the damages are to be ascertained by the jury, *although not always capable of being precisely measured by that method of computation.* * * * The usual rule of excluding profits in estimating damages *does not apply where the earnings of the profits is directly contemplated in the contract which has been breached.*" (Italics ours).

It cannot, therefore, be said in the case at bar that the profits sought to be recovered here were purely speculative or imaginary, when the uncontradicted evidence establishes the fact that more than 100 Reo cars could have been sold by the Harmon Company had plaintiff in error delivered same. The market was stable and certain in the territory allotted for such cars. It is clear from the evidence that the 100 cars, if delivered, could have been sold without the slightest difficulty, as there was a steady demand and an unfailing market for such cars. This is clearly demonstrated by the testimony of the plaintiff in error that it could not secure sufficient cars to meet the demand made upon it, which

testimony was given in an effort to show that its failure to furnish the cars in question was due to the inability of the factory to provide it with all cars needed to fill its contracts and orders entered into and received prior to the contract with the Harmon Company, as it expressly showed, by its own records, that it had received 290 cars which it was at liberty to have furnished the Harmon Company, because it had not previously contracted for said 290 cars. It was as easy, from the evidence, to sell these cars in the territory limited as it would have been to have disposed of a thousand barrels of sugar or a thousand sacks of coffee, which a wholesaler might have contracted to sell a retailer at the City of Seattle, and which he failed to deliver. And, as we have shown, the contract was entered into *for the direct purpose of allowing the Harmon Company to sell the cars at a profit over and above what it contracted to pay therefor,* the rule of excluding profits does not apply in the case at bar. One who prevents his contractor from performing his agreement is liable in damages for the profits which he would have made if he had performed it, *because such profits are the direct and immediate fruits of the contract which the parties necessarily contemplated, and in fact promised when the agreement was made.*

Masterton vs. Mayor of Brooklyn, 7 Hill, 61, 699.

Railway Company vs. Howard, 13 How., 307, 344.

Mining Co. vs. Humble, 153 U. S., 540.

and cases heretofore cited.

The plaintiff in error, as a dealer in these automobiles knew, when it made the contract, that the Harmon Company had entered into the agreement for the specific purpose of making a profit on each car furnished it, and it thereby promised the Harmon Company such profits, for nothing but a profit on the sales was in the contemplation of the parties.

It should be borne in mind that there was not the slightest contention in the court below, nor is there any such contention here that had the cars been furnished the Harmon Company could have sold them in the territory designated and within the time prescribed. It therefore stands admitted for the purpose of this case that the cars could have been sold. The only contention the plaintiff in error made that it had a right to breach the contract under the third provision thereof for reapportionment, and because it could not secure sufficient cars from the factory to meet contracts it had

entered into previous to the Harmon contract, and that defendant in error could not have made all the profits which she claims she could have made. In this view it is difficult to understand upon what theory it may be seriously argued that the prospective profits were not recoverable.

On page 32 of its brief counsel for plaintiff in error state that the Harmon Company had agencies for several other cars besides the Reo, that it sold the Lozier, Interstate and Grant. That agency was for the second year the company was in business. (55, 186). There was no contention in the lower court that it had any agency for the year 1915 except for the Reo, nor was there any dispute nor is there any now, that both the Lozier and Interstate Companies failed with a loss to the Harmon Company of approximately $20,000. The cancellation of the contract in question put the Harmon Company out of business, because at that date it would have been utterly impossible for it to have gotten an agency for a known car, and unless a car is known it requires pioneering and is not profitable. (90). The cancellation of the contract also compelled the company to discontinue its shop, which had been profitable, because the shop alone could not possibly have been run with profit. (91).

On pages 30, 31 of its brief plaintiff in error seeks to cast suspicion upon the amount of the verdict by a statement that the sales of 43 cars had yielded a profit of approximately only $3000.00 to the Harmon Company, seeking to cast doubt as to the ability of the company to have made a larger sum out of the sale of the cars unsold at the time of the cancellation of the contract.

If the court will refer to the contract in suit it will observe that the commission or profit made by the Harmon Company was 22½ per cent on the list price of cars, and if reference is made to plaintiff's Exhibits Nos. 4 and 5, which are the contracts of Knutzen Brothers and the Burke Motor Car Company it will observe that the Burke Company got a commission or profit of 20 per cent on the list price for the 20 cars it agreed to sell and that Knutzen Brothers got 17½ per cent on list price for the 12 cars mentioned in the contract, with a further provision that they should have 20 per cent on all cars sold if they purchased 20, which they later did. It thus appears that on 40 of the 43 cars mentioned by counsel the Harmon Company was making just 2½ per cent. On the other sub-agency contracts the sub-agents were to be paid 15 per cent of the list price on the cars, leaving the Harmon Company

but 7½ per cent. It thus is perfectly apparent why the Harmon Company would make very much less money on the 43 cars sold sub-agents than it would make on the 43 cars that it was expecting to sell at retail, when in those cases it was making 22½ per cent on the list price of the cars.

The list price of the cars appears on page 144 of the transcript of record and by reference to pages 155-184 it will be found that all of the facts, aside from the exhibits, appear which are necessary in order to compute the loss which the Harmon Company sustained.

The next point urged by the plaintiff in error is that testimony was admitted showing the profits which the Harmon Company would have made on the shop in carrying out the terms of this contract, complaining particularly because those profits were used to reduce the overhead expense of selling the cars. It will be observed that paragraph numbered 9 of the contract required the Harmon Company to maintain "an efficient shop" for the care of the automobiles. There is nothing in the contract requiring the company to maintain that shop and render service to customers at a loss, nor at cost, and nothing to prevent the company from maintaining such an efficient shop as would be a source of

profit. And if, in complying with the terms of the contract, the shop maintained by it was, through the manner of its conduct, a source of profit, certainly the plaintiff in error cannot complain. Its right to complain of the manner in which that provision of the contract was observed is limited to failure to maintain an "efficient shop." In making this contract the parties to it had in contemplation the making of profit, as most plainly appears from an inspection of the contract. And it does not lie in the mouth of a party who has deliberately breached such an agreement to urge that the profits which would have resulted had he not breached the agreement may not be recovered by the party whom he has wronged. Courts do not listen with favor to an argument which would encourage breaches of agreements and do not put a premium upon such breaches at the instance of the guilty party.

It is next urged that the jury in figuring the profit which the Harmon Company would have derived from the sale of the 43 machines not sold at the time of the cancellation of the contract must have assumed that everyone of those 43 cars would have been sold at retail in the City of Seattle. Counsel has overlooked the fact that the Harmon Company had for itself the whole of King County,

except the little town of Kent (64)—that is, the most populous County, containing the largest city, in the State of Washington. And in the face of the evidence as to the facilities maintained by the Harmon Company for selling the cars, the care the company took of its customers, the very high class car, its desirability, its satisfactory qualities, its low upkeep, its excellent quality, the fact that it had all known improvements, the fact that it cost the purchaser $200.00 less than any car in its class, the abnormal demand for that character of car, in the Harmon Company's territory, during the life of the contract, the fact that sales of automobiles during the season of 1915 were double that of any other year, the fact that such sales have doubled each year since,—and these facts all stand admitted, —can it be said that there was no substantial evidence to justify the jury in believing that these cars could not all have been sold at retail? If there is such substantial evidence, that disposes of the question on this writ of error.

It is next urged that the jury overlooked the fact that plaintiff in error had the right to reapportion the Harmon Company's territory at any time that company was not "properly promoting the sale of Reo cars", calling attention to the fact that no

sub-agents had been secured in Jefferson, Kitsap, Island or San Juan Counties, and suggesting that it is fair to assume that if plaintiff in error had not cancelled the contract agency contracts would have been placed in these counties and a reasonable number of cars sold therein, with the result that the Harmon Company's profits would thereby have been reduced. Plaintiff in error cannot say that the Harmon Company was not properly promoting the sale of Reo cars when it had sold 57 of its 100 prior to the beginning of the real automobile season, when plaintiff in error was not furnishing it cars to sell, although even Clark, its secretary, testified that Thornton began telephoning for cars as early as the fall of 1914, (230, 248), and when the evidence was clear and conclusive that the Harmon Company repeatedly wrote and telephoned the plaintiff in error for cars (68, 130), and did not get them, particularly in view of the fact that Clark further testified that plaintiff in error was not complaining because the Harmon Company was not selling enough cars and that it sold more than the plaintiff in error furnished. (249).

Again, we ask whether there was any lack of substantial evidence showing that there existed no right to reapportion any of this territory, even

though the burden of proving cause for reapportionment of territory was on the plaintiff in error?

It is next urged that even if the contract had not been cancelled plaintiff in error could not have furnished to the Harmon Company more than 45 or 50 cars subsequent to the date of cancellation of the contract, and that by reason of that fact it was excused from performance by virtue of paragraph No. 10 of the contract, to the effect that shipment of cars covered by the contract should be made as specified in the contract, and "subject to the prior orders of other dealers and as the business of the manufacturer will permit." Prior to the making of the contract in question plaintiff in error had received orders from other dealers for but 60 cars, and received from the manufacturer prior to July 31st, 1915, 350 cars for distribution by it. (286-289). Hence, deducting prior orders, there remained 290 cars to deliver the 100 which plaintiff in error agreed to sell and deliver to the Harmon Company.

ERROR No. 1.

On page 36 of the brief it is urged that error was committed in permitting the witness Thornton to testify to the number of cars the Harmon Company could have sold during the life of the contract

had the same not been cancelled. The objection urged is that the witness being permitted to answer the question and having answered 125 cars, it was extremely prejudicial, because "the jury could very easily have been misled by the answer into believing that defendant in error was entitled to base her claim for prospective profits on the assumed sale of 125 cars; whereas, as we have stated, the contract called for but 100 cars altogether." The objection made to the question on the trial was in the following language:

> "Object to that as calling for a conclusion of the witness. He may testify as to what contracts he had. I believe he has done that. And if we admit that those machines would be taken here the ground would be covered. I don't believe the witness is qualified to say what would have happened if something else had happened. I submit that to your Honor." (128).

We trust that the court will note the difference between the objection urged to the question on the trial and the complaint which is now made. So doing, the assignment is conclusively answered. But furthermore, we know of no rule of evidence or of law which prohibits a witness from testifying to what he believes to be the truth, when his judgment is properly invoked. It would be a strange rule which would permit him to testify that 100 cars

could have been sold but prohibit him from stating that 125 cars could be sold.

Errors Nos. VI-IX.

It is urged that Burke of the Burke Motor Car Company had cancelled his contract for purchase of 20 cars from the Harmon Company, that at the time of cancellation of the contract Burke had determined to abandon his contract and refused to take any more cars from the Harmon Company "for the reason that the business relations with said company had become very unpleasant and the Harmon Motor Car Company had attempted to sell Burke a second-hand machine, representing the same as new," complaining of the action of the court in refusing to admit testimony to that effect. Burke testified that the reason he cancelled his contract was because the Harmon Company's contract had been cancelled by the plaintiff in error and relations were not pleasant. (225, 227). We observe nothing in the Burke Motor Car Company's contract requiring, as a condition precedent to its remaining a binding obligation, continued pleasant relations between the parties to it. It would be a strange rule of law which would permit a party to a contract to refuse to perform it because his rela-

tions with the other party to the contract were not pleasant. Such a rule of law would make it impossible in every action involving damages for breach of a contract, for a court to enter judgment therefor against the defaulting party. Burke, however, testified that his company was financially able to carry out the contract (226) and we respectfully suggest that his right to terminate his contract was not at his pleasure.

On page 38 it is urged that the Knutzen Brothers and Nicholson Auto Company's contracts were not in writing, and the jury should have been so instructed. In the first place no requested instruction on that point appears. In the second place it is not assigned as error. In the third place the contention finds no support in law whatever. Otherwise damages for future profits in the sale of an article never could be adjudged.

Lastly, it is urged that the jury arrived at its verdict without any intelligent calculation as to the probable prospective profits and urges that this was so apparent that defendant in error remitted from the verdict $893.95. The remission was made by calculating the expense of selling the 43 cars unsold at the highest figures of the witnesses on behalf of defendant in error. It is a significant fact that

counsel have not undertaken to point out any ground for the charge of lack of intelligent calculation on the part of the jury. The figures are in the record, as we have pointed out, and there appearing no show of error, or attempt to show error, there is nothing before the court.

The foregoing completes the discussion of all the alleged errors discussed by the plaintiff in error.

As we have hereinbefore called to attention, plaintiff in error has discussed but a few of its assignments of error. Those not discussed have doubtless been waived by it. If not, we suggest that a cursory examination will disclose their lack of merit, as, for example, assignments Numbered V and XXII. By the former, error is assigned in the ruling of the court sustaining an objection to a question concerning a conversation between Vogler and the president of The Northern Bank & Trust Company, had in the absence of the defendant in error, on the ground that it was hearsay (205). The identical testimony, given by the same witness, was later admitted by the court (280). By assignment No. XXII, error is predicated on the action of the court in not granting a new trial. On fundamental principles, this ruling is not subject to question in this court.

These two assignments are, we believe, illustrative of the assignments not discussed by the plaintiff in error. It not having discussed them, we shall not burden the court by so doing.

We respectfully submit that the judgment must be affirmed.

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